Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Performance Measurements and Standards for Unbundled Network Elements and Interconnection	)	CC Docket No. 01-318
	)	
Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance	)	CC Docket No. 98-56
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-47
	)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, and 98-141

REPLY COMMENTS OF XO COMMUNICATIONS, INC.

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Pursuant to the Notice of Proposed Rulemaking ("NPRM") adopted by the Federal Communications Commission (the "Commission") on November 8, 2001, and released on November 19, 2001,[1] XO Communications, Inc. ("XO") hereby submits its reply comments in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

The majority of initial comments filed in this proceeding demonstrate the overwhelming

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[1] *Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al*., Notice of Proposed Rulemaking, CC Docket No. 01-318, FCC 01-331 (rel. Nov. 19, 2001) (*UNE Measurements and Standards Notice*); *see also Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al*., Order, CC Docket No. 01-318, DA 01-2859 (rel. Dec. 7, 2001) (extending reply comments deadline to February 12, 2002).

support for the Commission's efforts to adopt a national list of critically important performance measurements, standards and reporting requirements for evaluating incumbent local exchange carrier ("ILEC") performance in the ordering, provisioning and maintenance of facilities on a wholesale basis to competing carriers. To that end, XO reiterates its support for the performance measurements and standards proposed in this proceeding by WorldCom, Inc. (the "WorldCom Measures").

XO urges the Commission to ensure that its adopted rules serve as baseline measurements, standards and reporting requirements, thus allowing the state commissions to implement more stringent rules pursuant to their authority under section 251(d)(3) of the Telecommunications Act of 1996 (the "Act"). In addition, the Commission should establish no date certain as a sunset. The rules should be evaluated on a periodic basis – perhaps every two years – at which time the rules and reporting requirements can be updated and modified as needed.

Furthermore, the Commission should also use this opportunity to adopt the natural corollary to unbundled network element ("UNE") performance measurements, standards and reporting requirements: a meaningful, self-executing enforcement mechanism to deter ILEC discrimination and to hold ILEC's accountable for noncompliance. As the vast majority of commentors explain, UNE performance measurements, standards and reporting requirements will be meaningless if they are not accompanied by a strict and efficient enforcement mechanism. The Commission should utilize all of its enforcement authority to deter ILECs from engaging in anticompetitive behavior, including, but not limited to: (i) imposing forfeitures on ILECs based on the severity, magnitude and repetition of performance failures; (ii) requiring payments and/or rebates to carriers injured by ILEC noncompliance; (iii) imposing appropriate

non-monetary penalties on ILECs for noncompliance; (iv) preserving all other enforcement remedies for carriers damaged by ILEC anticompetitive behavior; and (v) quickly resolving related complaints filed by injured carriers by utilizing the "rocket docket" complaint procedures under section 208 of the Act.

Finally, the Commission should make clear that the performance measurements, standards and reporting requirements adopted in this proceeding apply to ILECs only. The measurements, standards and related reporting requirements should not apply to competitive local exchange carriers ("CLECs"), as those carriers, to the extent they provide facilities on a wholesale basis, do not possess the ability, or the control over bottleneck facilities, to hinder the growth of competition in the local telecommunications service market.

II. DISCUSSION

A. The Commission should act quickly to adopt UNE performance measurements, standards and reporting requirements.

1. The development of national baseline UNE performance measurements, standards and reporting requirements is vital to promote the growth of competition for local telecommunications services and to enforce the ILECs' obligations under the Act.

In their initial comments, CLECs and state agencies explain that the ILECs continue to disadvantage competitors through the inadequate and discriminatory provisioning and maintenance of services and facilities.[2] Despite existing, although limited, state and federal performance monitoring systems and enforcement plans, the ILECs fail to provide services and

[2] *See*, *e.g.*, Comments of the New York Department of Public Services ("NYDPS Comments") at 1-2; XO Comments at 6-10; Comments of Adelphia Business Solutions, Inc. ("Adelphia Comments") at 4; Comments of Focal Communications Corporation, Pac-West Telecomm, Inc., and US LEC Corp. at ("Focal Comments") 2-9; Comments of Business Telecom, Inc., Cavalier Telephone, LLC, DSLnet Communications, L.L.C., Network Telephone Co., and RCN Telecom Services, Inc. ("BTI Comments") at 13-20.

facilities at acceptable standards, electing instead to absorb millions of dollars in penalties.[3] National baseline UNE performance measurements, standards and reporting requirements are necessary to ensure that the ILECs provision and maintain UNEs in a just, reasonable and nondiscriminatory manner. Such performance measurements, standards and reporting requirements enable the Commission and the states to determine whether an ILEC has met its statutory obligations to receive section 271 authority. Further, performance measurements, standards and reporting requirements – with related enforcement mechanisms – play a vital role in preventing an ILEC's "backsliding" after it has received section 271 authority.

Accordingly, to promote the growth of competition for local telecommunications services and to ensure that the ILECs meet their obligations under the Act, the Commission should quickly develop a set of baseline UNE performance measurements, standards and reporting requirements, with related enforcement mechanisms. Without such rules, reporting requirements and enforcement mechanisms, the ILECs will continue to hamper the growth of competition, to the detriment of both competitors and consumers.[4]

2. The CLECs face tremendous obstacles and anticompetitive actions in their efforts to obtain UNEs from the ILECs.

In order to promote competition and ensure that ILECs comply with their statutory duty to provide UNEs in a "just, reasonable and nondiscriminatory manner," [5] the Commission should act quickly to adopt UNE performance measurements, standards and reporting requirements.

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[3] *See* "SBC Southwestern Bell Pays More Than $20 Million to Competitors, Regulators," Knight Ridder/Tribune Business News (Feb. 7, 2002) (reporting that Southwestern Bell has paid more than $20 million to competitors and regulators in the five-state region since 1999) (an electronic version of the article is available at the following web site: http://cnniw.yellowbrix.com/pages/cnniw/Story.nsp?story_id=27561463&ID=cnniw).

[4] *See* Comments of the General Services Administration at 9-10.

[5] 47 U.S.C. § 251(c)(3).

Commentors in this proceeding echo the central concern set forth in XO's initial comments: ILECs continue to hinder the growth of competition for local telecommunications services by obstructing CLEC efforts to obtain UNEs on just, reasonable and nondiscriminatory terms.[6]

All too often, the ILECs thwart CLEC entry by rejecting CLEC UNE orders for unlawful and anticompetitive reasons, thereby forcing CLECs to use more expensive Special Access services to serve their end user customers.[7] In its initial comments, XO referred to the difficulty it has faced obtaining UNE loops, multiplexing and transport from the ILECs.[8] As XO explained in a recent filing with the Commission, ILECs hinder the growth of competition by imposing arbitrary rules regarding the ordering of UNE loops, multiplexing and transport.[9] For instance, Verizon fails to comply with its nondiscriminatory unbundling obligations under section 251(c) of the Act when it routinely rejects UNE orders by claiming, without adequate proof or explanation, that facilities are "unavailable."[10] Verizon defends its anticompetitive actions by relying on its interpretation of the Eighth Circuit holding[11] and claiming that it is not required to offer facilities as UNEs if such unbundling would require the slightest modifications to its

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6 *See, e.g.,* XO Comments at 6-10; Adelphia Comments at 4; Focal Comments at 2-9; BTI Comments at 13-20.

7 *See*, *e.g.*, Adelphia Comments at 4.

8 XO Comments at 7-10.

9 *See* Comments of XO Communications, Inc., *In the Matter of Application of Verizon New Jersey Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in New Jersey*, CC Docket No. 01-347 (submitted Jan. 14, 2002) (detailing Verizon's policy of rejecting UNE orders due to facilities being "unavailable").

10 The Focal Comments note that some ILECs reject upwards of sixty percent (60%) of CLEC UNE orders for the reason of "no facilities." *See* Focal Comments at 46-50.

11 *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part on other grounds sub nom. AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

network, including augmenting electronics or installing a simple line card.[12]

XO and several other commentors note similar experiences where ILECs reject CLEC UNE orders for the reason of "no facilities."[13] By invoking the untenable "no facilities" rejection of a CLEC's UNE order, the ILEC attempts to avoid its section 251(c) unbundling obligations. Further, the ILEC will "build" the necessary facilities if the requesting CLEC withdraws its UNE order and submits an order for the same circuits as a Special Access service. As Adelphia notes in its comments, when the CLEC switches its order to Special Access facilities, the order is generally accepted and the "delivery date does not reflect that any significant installation or construction was required."[14] The Special Access facilities, however, are more expensive and are not currently subject to any performance rules. The "no facilities" rejection issue clearly demonstrates how the ILECs game the competitive process in order to avoid their obligations under the Act.

Accordingly, XO urges the Commission to adopt UNE performance measurements, standards and reporting requirements that address the ILECs' unlawful refusals to provision UNE loops, multiplexing and transport by asserting a lack of facilities.[15] The Commission

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[12] Other ILECs have attempted to engage in the same anticompetitive behavior, and the relevant state commissions established a definition of "no facilities" to combat the ILEC's untenable position. *See*, *e.g.*, *In the Matter of Complaint of BRE Communications, L.L.C., d/b/a Phone Michigan for violations of the Michigan Telecommunications Act,* Case No. U-11735, February 9, 1999 and *Illinois Commerce Commission On Its Own Motion v. Illinois Bell Telephone Company Investigation of Construction Charges,* Docket 99-0593*,* August 15, 2000 (both state commissions concluded that the ILEC's unbundling obligations include the requirement to perform some construction to provision the requested UNE).

[13] *See* XO Comments at 6-10; *see also* Adelphia Comments at 4; *see also* Focal Comments at 44-57; *see also* BTI Comments at 13-20; *see also* Mpower Comments at 12-15.

[14] Adelphia Comments at 4.

[15] In addition, XO urges the Commission to move quickly to develop performance measurements, standards and reporting requirements in its pending Special Access docket, providing CLECs with a level of certainty regarding ordering, provisioning and maintenance of (footnote continued on next page)

should adopt ordering performance measurements and associated standards to measure the frequency with which ILECs provide a "no facilities" response to a CLEC UNE order.[16] Along with adopting the measurements and standards, the Commission should adopt a clear definition of "no facilities" to define when ILECs may properly reject a CLEC UNE order on the assertion of "no facilities."

3. The Commission should quickly implement specific measurements with required CLEC-specific, market-by-market reporting on a monthly basis that shows yearly trends at a glance, disaggregated on a sufficiently granular level.

As noted, XO supports the WorldCom Measures. XO believes that these measures represent the baseline number of performance measurements required to ensure that the ILECs comply with their section 251 obligations. Furthermore, as some state commissions note in their comments, XO recognizes that the baseline measurements may not cover all areas of performance that a state wishes to monitor or address in its rules.[17] The measures supported by XO should serve as baseline measurements, allowing the states to augment as deemed necessary.[18]

XO urges the Commission to act quickly to implement the UNE performance measurements, standards and reporting requirements adopted in this proceeding. In addition, the Commission should adopt performance measurements, standards and reporting requirements without conducting workshops, and those performance measurements, standards and reporting

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ILEC-provided UNEs and Special Access, whichever method of entry a CLEC may require or desire.

16 *See* Adelphia Comments at 4; *see also* Focal Comments at 44-57; *see also* BTI Comments at 13-20; *see also* Mpower Comments at 12-15.

17 *See* Texas PUC Comments at 5-6.

18 *See* Missouri PSC Comments at 6-7.

requirements should be effective immediately upon adoption by the Commission.[19] There is no reason to phase in implementation as suggested by BellSouth.[20] Further delay would only harm the growth of competition.

While some regional Bell operating companies ("RBOCs") oppose the notion of national UNE performance measurements, standards and reporting requirements,[21] other RBOCs support the Commission's development of such rules.[22] Qwest asserts that, through the development of Performance Indicator Definitions ("PIDs") and Performance Assurance Plans ("PAPs"), its region has appropriate standards and enforcement plans in place to satisfy the issues under consideration in this proceeding.[23] However, Qwest's PIDs and PAPs are not effective in every state in the Qwest region. Furthermore, the PAPs focus on post-271 compliance and provide no protection for CLECs prior to Qwest's receipt of section 271 authority.

Similarly, the other RBOCs that oppose the development of national baseline UNE performance measurements, standards and reporting requirements ignore the fact that many states do not have UNE performance rules and reporting requirements in place.[24] Without baseline UNE performance measurements, standards and reporting requirements, CLECs will not receive adequate assurances that the ILECs are in compliance with their section 251(c) obligations. Further, in states where more than one ILEC serves as an incumbent provider (*e.g.*,

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19 Many commentors oppose the needless delay and unnecessary expense that would come with conducting workshops prior to adopting UNE performance measurements, standards, and reporting requirements in this docket. *See*, *e.g.*, Cox Comments at 4; BTI Comments at 3, 25-26; Adelphia Comments at 15.

20 BellSouth Comments at 17-18.

21 *See*, *e.g.*, Qwest Comments at 4-24.

22 SBC Comments at 7-9; BellSouth Comments at 10-16.

23 Qwest Comments at 8, 17-18.

24 *See* BellSouth Comments at 8-10 (noting that only five of the nine states in the BellSouth region have adopted performance measurements).

Verizon and SBC in Texas), the same state rules, to the extent such rules exist, may not apply to both carriers. In such states, the CLECs are left with either two separate sets of performance rules or one set of rules that applies to one ILEC only.[25]

With regard to the adoption of specific performance measurements, XO opposes the suggestion by some of the RBOCs that billing measurements are not needed.[26] SBC, for example, argues that late billing actually benefits the CLECs by improving the CLECs' cash flow positions.[27] SBC's disingenuous position misses the point entirely and fails to address the main concern that CLECs need timely and accurate billing from the ILECs.[28]

With respect to performance reporting requirements, the RBOCs suggest everything from reporting on only a quarterly basis to no reporting at all.[29] Those options do not provide the Commission with the information it needs to enforce the ILECs' obligations under section 251 of the Act. Coupled with BellSouth's notion that any rules adopted in this proceeding should expire

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[25] For example, in the case of the former GTE states, GTE (now Verizon) did not face section 271 requirements and, thus, did not have incentive to agree to meaningful UNE performance obligations in states like Texas. SBC, on the other hand, agreed to performance measurements, standards and a remedy plan as part of its application to provide long distance service in Texas. Accordingly, the performance measurements that currently apply to Verizon in the former GTE states – performance measurements, standards and reporting requirements that were adopted in the Commission's *BA-GTE Merger Order* – are inadequate to ensure that Verizon complies with its obligations under section 251(c) of the Act. In addition, most of the performance obligations adopted in the *BA-GTE Merger Order* are set to expire 36 months after the merger closing date. *See BA-GTE Merger Order*, "Conditions for Bell Atlantic/GTE Merger," ¶ 64.

[26] *See*, *e.g.*, SBC Comments at 30-31.

[27] *Id*.

[28] Several state commissions and CLECs note the need for appropriate billing measurements in order to ensure timely, complete and accurate billing information from ILECs to CLECs. *See*, *e.g.*, Texas PUC Comments at 8; Ohio PUC Comments at 11; Colorado PUC Comments at 10; Minnesota Department of Commerce Comments at 3; Adelphia Comments at 10-11.

[29] *See, e.g.,* SBC Comments at 46 (suggesting quarterly reporting).

as soon as one year after implementation,[30] the RBOCs' proposals would require them to post as few as three sets of performance results prior to sunset. Such proposals are unacceptable and would render meaningless any attempt to measure and enforce the ILECs' obligations under section 251.

To be effective and meaningful, ILEC UNE performance results must be reported, and the reporting should be provided – and posted to an Internet web site – on a CLEC-specific, market-by-market and monthly basis that shows yearly trends at a glance.[31] Region-wide reporting, as suggested by BellSouth, would not provide the Commission with accurate details regarding ILEC UNE performance.[32] Indeed, a region-wide report might allow an ILEC to fail miserably in certain states while giving the outward appearance of UNE performance compliance. Further, as detailed in the WorldCom Measures and explained by XO in its initial comments, the reporting must be sufficiently granular in its disaggregation to provide the Commission with useful information.[33]

XO strongly opposes ILEC suggestions that a date certain should be established as a sunset for rules and requirements adopted in this proceeding.[34] As the California Public Utilities Commission notes in its comments, "it does not make sense to "sunset" the provisions that monitor the health of competition and keep the ILEC from "backsliding" to it natural

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30 *See* BellSouth Comments at 73-74 (suggesting a sunset as short as one year after implementation); *see also* Verizon Comments at 66-67 (suggesting sunset two years after implementation).

31 *See*, *e.g.*, BellSouth Comments at 81; Texas PUC Comments at 9; Oklahoma Corporation Commission Comments at 4-5; ALTS Comments at 7-8; Sprint Comments at 13.

32 BellSouth Comments at 77-78.

33 See XO Comments at 13-14.

34 *See* BellSouth Comments at 73-74; *see also* Verizon Comments at 66-67.

equilibrium, a monopoly."[35] The UNE performance rules and reporting requirements should be reviewed on a periodic basis – perhaps every two years.[36] During the periodic review, the Commission can modify and update the rules and reporting requirements as it deems necessary.

While some RBOCs express concerns about being over-penalized for insignificant data inaccuracies, XO understands the need for allowing an acceptably small margin of statistical forgiveness. But XO does not support statistical methodologies with which the ILECs will tinker to avoid compliance with the performance measurements, standards and reporting requirements adopted in this proceeding. In addition, XO and other commentors urge the Commission to make the ILECs' reported information available to audits by the Commission, the state commissions, and the ILECs' carrier-customers.[37] As the Minnesota Department of Commerce notes in its initial comments, rapid technological changes make periodic scrutiny of the measurements necessary "to ensure that standards continue to accurately reflect what they intend to measure," and an audit process is necessary "to ensure proper accounting of excluded data and disaggregated data."[38]

B. The Commission has legal authority to adopt and implement UNE performance measurements, standards and reporting requirements.

No commentors, including the RBOCs, question the Commission's authority to develop regulations, including UNE performance measurements, to implement section 251 of the Act.[39] However, SBC and Verizon contend that performance standards cannot be developed, and that

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35 California PUC Comments at 10.

36 XO opposes the too-frequent annual review suggested by SBC. SBC Comments at 45.

37 *See*, *e.g.*, BellSouth Comments at 67-70 (stating that ILEC data should be stored in a secure, stable and auditable manner); Sprint Comments at 20-21; Minnesota Department of Commerce at 4; BTI Comments at 22-25.

38 Minnesota Department of Commerce Comments at 4.

39 *See*, *e.g.*, SBC Comments at 9-10 (citing 47 U.S.C. § 251(d)(1) and *AT&T Corp. v. Iowa*

(footnote continued on next page)

any such efforts would be contrary to the Act.[40] Preferring to focus on the word "nondiscriminatory," SBC and Verizon ignore the requirement under section 251(c)(3) of the Act that ILECs must provide "just" and "reasonable" access to UNEs.

As explained in the discussion above concerning the anticompetitive "no facilities" rejections the CLECs receive from Verizon and other ILECs, the "superior network" claim of the ILECs is mere gamesmanship to avoid complying with section 251. Providing CLECs with a level of service that is "just" and "reasonable" does not require the ILECs to design a "superior" network. Just as noted in the context of rejecting CLEC UNE requests for the reason of "no facilities," this attempt to avoid performance standards is a further effort by the ILECs to avoid compliance with section 251 and reap the financial and regulatory benefits of Special Access services.

Furthermore, SBC's and Verizon's arguments conflict with previous Commission actions implementing the provisions of section 251. For example, in the context of collocation, the Commission established specific intervals with which the ILECs must comply.[41] Similarly, the Commission retains legal authority to implement UNE performance measurements, standards and reporting requirements under sections 4(i), 201(b), 202(a), 251(c) and 251(d) of the Act.[42]

The Commission should exercise its authority to develop national baseline UNE performance measurements, standards and reporting requirements. Measurements alone are not

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Utils. Bd., 119 S. Ct. 721, 730 n.6 (1999)).

[40] SBC Comments at 32-34; Verizon Comments at 21-32.

[41] *See In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, CC Docket Nos. 98-147 and 96-98, FCC 00-297, (rel. Aug. 10, 2000).

useful: they must be accompanied by appropriate procompetitive standards. As Mpower notes in its initial comments, the real objective in this proceeding is to ensure good ILEC performance.[43] Merely measuring poor performance accomplishes nothing.

C. The Commission's adopted performance measurements, standards and reporting requirements should serve as baseline rules, permitting the states to adopt more stringent rules pursuant to § 251(d)(3) of the Act.

Many of the RBOCs urge the Commission not to develop national rules unless those rules and reporting requirements will displace the states' existing UNE performance measurements, standards and reporting requirements.[44] Arguing against the creation of federal measurements, standards and reporting requirements, Qwest asserts that the ILECs should not be required to adopt measurement methodologies that are inconsistent with the filings made in the states.[45]

XO and other commentors do not suggest an approach whereby the Commission's UNE performance measurements, standards and reporting requirements would supplant the states' efforts. To the contrary, XO and others emphasize that the performance rules and reporting requirements adopted in this proceeding would serve as a baseline or floor, permitting states to adopt the Commission's rules *in toto* or to develop more stringent requirements as they deem necessary.[46] None of the commentors suggests that the states should be stripped of their authority under the Act. Indeed, XO agrees with the commentors that applaud the states' efforts to date and recognize that the states have authority under section 251(d)(3) of the Act to expand on the Commission's UNE performance measurements, standards and reporting requirements, so

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42 47 U.S.C. § 154(i), 201(b), 202(a) and 251(c) and (d).

43 Mpower Comments at 11.

44 SBC Comments at 9-10; BellSouth Comments at 10-16; Verizon Comments at 32-36.

45 Qwest Comments at 30-31.

46 The ability to adopt an acceptable set of baseline UNE performance measurements, standards and reporting requirements is particularly important for those states that have not

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long as such efforts are consistent with the Act and the Commission's rules.[47]

D. The Commission should adopt a self-executing enforcement mechanism with sufficient penalties to deter ILEC anticompetitive behavior.

With respect to establishing an appropriate enforcement mechanism to accompany the adopted performance measurements, standards and reporting requirements, XO and the majority of commentors support the position stated by the Texas Public Utility Commission: "[A]n adequate remedy plan or enforcement mechanism is vital to ensuring proper performance from the ILEC."[48] The RBOCs, however, argue against creating an enforcement mechanism specific to the rules and reporting requirements adopted in this proceeding.[49] The RBOCs assert that the current standard enforcement remedies are sufficient to deter ILEC anticompetitive behavior.[50] Of course, the RBOCs prefer that performance information not be reported at all. Under the RBOCs' proposals, the Commission and the CLECs would face an impossible task in holding the ILECs to their statutory obligations.

As many parties discuss in their initial comments, the ILECs are not complying with their current UNE obligations under section 251 of the Act.[51] The ILECs appear willing to attempt compliance only where they face substantial penalties for noncompliance.[52] And, even under circumstances where compliance is required and enforced with forfeitures under section 503 of the Act or pursuant to agreements between the Commission and the ILECs, the ILECs appear

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adopted such rules at this time.

47 47 U.S.C. § 251(d)(3).

48 Texas PUC Comments at 3.

49 *See*, *e.g.*, SBC Comments at 35-42.

50 *See*, *e.g.*, SBC Comments at 20 (supporting the use of standard complaint and forfeiture procedures under sections 208 and 503 of the Act).

51 *See* Adelphia Comments at 4; *see also* Focal Comments at 44-57; *see also* BTI Comments at 13-20; *see also* Mpower Comments at 12-15.

52 *See* Birch Telecom, Inc. Comments at 5-6.

more than content to amass fines into the millions of dollars.[53] Without significant, meaningful penalties for performance failures, ILECs will continue to hinder the growth of competition for local telecommunications services, harming consumers and CLECs.

The Minnesota Department of Commerce illustrates the point in its comments by noting that, in a Minnesota PUC proceeding, "depositions of U S WEST employees taken during the Qwest/U S WEST merger proceeding indicated that while managers were well aware of Minnesota retail service quality performance standards, the Company's internal goals fell far short of Minnesota standards" because "U S WEST was willing to pay certain levels of penalties rather than strive for a performance level that met its Minnesota service quality obligations."[54]

The main goal behind the Commission's creation of a self-executing enforcement mechanism should be to impose appropriate levels of deterrence – in an efficient and just manner – for ILEC failures to maintain adequate performance standards. Accordingly, XO and the vast majority of other commentors urge the Commission to exercise its full panoply of enforcement authority, including, but not limited to, the following: (i) self-executing forfeitures against the ILECs;[55] (ii) automatic payments and/or refunds to injured CLECs;[56] (iii)

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53 In fact, just over one week after initial comments were filed in this proceeding, a Reuters news article highlighted the ongoing performance failures of SBC and Verizon and the penalties assessed against the carriers by the Commission for performance shortfalls. Apparently, existing performance enforcement plans are not sufficient to curb ILEC noncompliance. *See* "SBC, Verizon Keep Dishing Out Fines," Reuters (January 30, 2002).

54 Minnesota Department of Commerce Comments at 3-4.

55 ALTS Comments at 8-11; Focal Comments at 20-26 (suggesting an expedited process for imposing forfeitures against the ILECs pursuant to section 503(b) of the Act).

56 Covad Comments at 34-36; Adelphia Comments at 12 (proposing that CLECs be eligible for refunds on both recurring and non-recurring charges related with an ILEC's failure to meet any performance standards – a refund would be paid to a CLEC for individual instances of noncompliance, and a general credit would be allotted to all CLECs where an ILEC fails in its collective performance standard for a month).

enforcement actions pursuant to section 271(d)(6) of the Act;[57] (iv) resolution of carrier disputes under a streamlined process like the "rocket docket" complaint procedures of section 208 of the Act;[58] and (v) imposition of other appropriate non-monetary penalties on the ILECs.[59]

Sufficient penalties are required to deter ILEC anticompetitive behavior. Penalties under the self-executing enforcement plan should increase with the magnitude of the performance failure. Further, they should increase for repeated performance failure. And the penalties should be most severe for the most important measurements. At the same time, injured parties must be able to pursue all available enforcement remedies, including actions before the Commission, the state commissions, and federal and state courts. The ILECs should not be permitted simply to absorb the penalties as the cost of doing business and the cost of destroying competition.[60]

As the majority of commentors explain, the Commission has all of the necessary legal authority to implement a meaningful and effective enforcement plan. Section 251(d) expressly authorizes the Commission to establish regulations necessary to implement the requirements of section 251.[61] Further, sections 201(b) and 202(a) provide the Commission with authority to prescribe such rules and regulations as needed in the public interest to carry out the provisions of

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57 Adelphia Comments at 13-14 (suggesting that the Commission halt consideration of an ILEC's pending 271 applications where an ILEC has demonstrated repeated performance failures, or, where an ILEC has received 271 authority, suspend an ILEC's marketing to and enrollment of additional subscribers pending improved performance).

58 BTI Comments at 10-12; Focal Comments at 33-34.

59 *See*, *e.g.*, Mpower Comments at 11 (suggesting that, in order to ensure good ILEC performance, the Commission might consider imposing non-monetary awards that actually "fix[]" the problems at hand, such as ordering "truck rolls" to improve certain standards or ordering the ILECs to dispatch technicians in certain circumstances).

60 *See* Minnesota Department of Commerce Comments at 3-4.

61 *See* Comments of the Competitive Telecommunications Association ("CompTel Comments") at 3 (citing to 47 U.S.C. § 251(d)); *see also* McLeodUSA Comments at 4.

the Act.[62] Moreover, the Commission has broad authority under sections 206-208, 271(d)(6) and 503 to establish remedy provisions in accordance with the performance measurements, standards and reporting requirements proposed in this proceeding.[63]

E. The rules and reporting requirements adopted in this proceeding should apply only to ILECs.

Some RBOCs contend that any adopted UNE performance measurements, standards and reporting requirements should apply equally to all carriers, including CLECs.[64] However, the RBOC arguments are not compelling and clearly ignore both the procompetitive purpose behind the implementation of such rules and reporting requirements and the analysis of regulatory burden versus benefit. Because the UNE performance rules and reporting requirements are related to section 251(c) obligations, carriers that do not have a duty to comply with section 251(c) should not be subject to the corresponding performance measurements, standards and reporting requirements.

As the New York Department of Public Service explains in its initial comments, "where the ILECs retain market power by virtue of their monopoly legacy, they also have the *opportunity* to [disadvantage their competitors] through inadequate, even discriminatory, provisioning and maintenance of services and facilities required by their competitors."[65]

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62 47 U.S.C. §§ 201(b), 202(a). *See* CompTel Comments at 3; *see also* Covad Comments at 9-11.

63 47 U.S.C. §§ 206-208, 271(d)(6), and 503. *See* Covad Comments at 32; *see also* ALTS Comments at 11-13; *see also* Sprint Comments at 10-11; *see also* Joint CLEC Comments of the Competitive Coalition – Dynegy Global Communications, e.spire Communications, ITC^DeltaCom, KMC Telecom, Metromedia Fiber Network Services, NuVox, Talk America and Z-Tel Communications at 13-17.

64 *See*, *e.g.*, SBC Comments at 29-30; BellSouth Comments at 24-25. Of the several state commissions submitting comments, only the California Public Utilities Commission ("CPUC") advocates applying the rules and reporting requirements to CLECs. *See* CPUC Comments at 6.

65 NYDPS Comments at 2 (emphasis in original).

Performance rules and reporting requirements should not apply to CLECs simply because the CLECs do not possess the market power to hinder the growth of competition for local telecommunications services. "The purpose of a performance monitoring program is to keep the local market open to competition by ensuring that the ILECs continue to provide [] necessary inputs in a commercially-viable manner."[66]

Indeed, as BellSouth notes in its comments, "as facilities-based competition becomes more prevalent and competitive alternatives increase, the market place will ensure that all carriers…will have ample marketplace incentive to deliver satisfactory performance to wholesale customers."[67] Until the market becomes fully competitive, the Commission should focus on requiring the ILECs to comply with their unbundling and interconnection obligations under the Act through the implementation of performance measurements, standards and reporting requirements as well as effective enforcement mechanisms. The majority of commentors also reject the imposition of ILEC obligations on the CLECs.[68] Imposing performance measurements, standards and reporting requirements on carriers not subject to section 251(c) unbundling obligations, including CLECs, would serve no purpose, and the regulatory burden would certainly outweigh any imaginable benefits.

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66 *Id*.

67 BellSouth Comments at 20. While BellSouth's statement illustrates XO's point in this respect, it should be noted that BellSouth used the statement to argue against imposing a UNE performance enforcement mechanism. XO finds BellSouth's argument puzzling and circular. Without a proper enforcement mechanism to punish ILEC intransigence, competition will not become "more prevalent," and "competitive alternatives" will not increase.

68 *See*, *e.g.*, Focal Comments at 37; BTI Comments at 24-25; Covad Comments at 34-36; McLeodUSA Comments at 10; ALTS Comments at 5-6.

III. CONCLUSION

For the reasons discussed herein, XO respectfully requests that the Commission act quickly to adopt performance measurements, standards, reporting requirements, and a meaningful, self-executing enforcement mechanism, with substantial penalties for noncompliance, with regard to the ordering, provisioning and maintenance of ILEC UNEs.

Respectfully submitted,

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